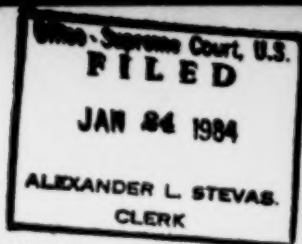


83-1291



IN THE
SUPREME COURT OF THE UNITED STATES

Term, 19____

No.

GEORGE A. SOLOMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STANLEY W. GREENFIELD,
Counsel for Petitioner,
George A. Solomon

GREENFIELD & MURTAGH
728 Fifth Avenue
Pittsburgh, Pennsylvania 15219
Telephone: 412-261-4466

**REASONS RELIED UPON FOR ALLOWANCE OF
THE WRIT**

I. Whether the search warrant used
to seize Petitioner's financial
records was supported by probable
cause for its issuance?

II. Whether the search warrant used
to seize Petitioner's financial
records was a prohibited general
warrant?

**PARTIES TO THIS PROCEEDING
IN THE COURT BELOW**

This action, as filed in the United States Court of Appeals for the Third Circuit, was styled United States of America v. George A. Solomon, George T. Teslovich, and George M. Teslovich, Jr., George A. Solomon, Appellant, at No. 83-5312. Petitioner's co-defendants below filed separate appeals denominated as United States of America v. George R. Teslovich, No. 83-5313, and United States of America v. George M. Teslovich, Jr., No. 83-5339, which appeals were consolidated before the Third Circuit Court of Appeals on July 22, 1983.

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The United States Court of Appeals for the Third Circuit issued a Memorandum Opinion and Judgment on December 5, 1983. A copy of the Memorandum Opinion is contained in the Appendix at pp. 1a-5a. A copy of the Judgment is contained in the Appendix at pp. 6a-7a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 5, 1983. Petitioner did not submit a Petition for Rehearing. The jurisdiction of the Supreme Court of the United States is invoked under Title 28 United States Code Section 1254(1).

**CONSTITUTIONAL PROVISIONS
INVOLVED IN THIS CASE**

The Fourth Amendment to the Constitution
of the United States provides:

The right of the people to be
secure in their persons, houses, papers,
and effects, against unreasonable
searches and seizures, shall not be
violated, and no Warrants shall issue,
but upon probable cause, supported by
Oath or affirmation, and particularly
describing the place to be searched,
and the persons or things to be seized.

STATEMENT OF THE CASE

Procedural

This petition is before the Court from the denial of Petitioner, George A. Solomon's appeal, (hereinafter "Solomon"), from the Judgment of Sentence imposed by the trial court, and the upholding of the denial of his Motion to Suppress Evidence. Petitioner's appeal to the United States District Court for the Third Circuit was joined by Co-Defendants, George R. Teslovich and George M. Teslovich, Jr., each of whom filed a separate Brief on related issues. A Motion to Consolidate the appeals of the other two was granted by Order of the Third Circuit Court of Appeals dated July 22, 1983. All issues raised by the various Defendants were made applicable to the other defendants, and each Defendant adopted the arguments propounded by the others, where appropriate. George R. Teslovich has filed a separate petition for Writ of

Certiorari to this Court. George M. Teslovich Jr. did not file a petition.¹

Each of the Defendants was charged in the same multi-count Indictment in the Western District of Pennsylvania, alleging various income tax violations of 26 U.S. Code with respect to the operation of Solomon & Teslovich, Inc., a contracting and trucking company, in Masontown, Pennsylvania, twenty (20) miles from Pittsburgh, (hereinafter "S&T"), in which each Defendant was a principal shareholder. The Defendants filed a Motion to Suppress the use of numerous records seized by the FBI, which served to make out the tax charges in the indictment. Judge Donald Ziegler denied Solomon's Motion to Suppress by transcribed

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1. Petitioner intends to join with George R. Teslovich in filing a motion for joint consideration of their respective petitions pursuant to Rule 42 of the Supreme Court Rules.

opinion dated January 19, 1983. (See Petitioner's Appendix to his Third Circuit Brief, 37a-39a), (hereinafter "Brief App"). Thereafter, and based on a plea agreement entered into between the prosecution and the various Defendants, Solomon entered a conditional plea of guilty to three counts of the Indictment, in accordance with the teachings of United States v. Moscow, 588 F.2d 882 (3rd. Cir. 1978) and United States v. Zudick, 523 F.2d 848 (3rd. Cir. 1975). On April 22, 1983 the Court sentenced Solomon to seven (7) years imprisonment, a Ten Thousand Dollar (\$10,000.00) fine and five (5) years probation.

Petitioner filed a Notice of Appeal to the Third Circuit Court of Appeals on April 27, 1983. On December 5, 1983, the Third Circuit Court of Appeals filed a Memorandum Opinion and Judgement denying Petitioner's Appeal, (Appendix, pp. 1a-7a).

Petitioner filed a Motion to the Third Circuit Court of Appeals on December 16, 1983 to stay the mandate pending this application to the Supreme Court of the United States for a Writ of Certiorari.

On January 3, 1984, the Third Circuit Court of Appeals entered an Order staying the mandate herein until January 24, 1984.

Background

The investigation giving rise to the Indictment arose out of events commencing in July, 1979 when Henrietta Foster, (hereinafter "Foster"), an employee of Suncrest Environmental Resources Corporation, (hereinafter "SERC"), a small Pennsylvania corporation, wholly unrelated to S&T, turned over photocopies of certain documents to the FBI which had been given to her by Phillip Gaziano, (hereinafter "Gaziano"), her then employer and President-Owner of SERC. (Transcript of

Pretrial Motions, 165), (hereinafter "HT"). These records were photocopied by the FBI and returned to Foster, who returned them to Gaziano the next day. It was stipulated by the Government and Defendants that these records were either destroyed by Gaziano or that, in any event, the Government possessed no information that these records were ever returned to S&T from whom they had allegedly taken (Brief App., 5a).

On December 17, 1979, FBI Special Agent Richard R. Geitgey, (hereinafter "Geitgey"), applied for an Affidavit for Search Warrant for S&T headquarters.

Geitgey's testimony disclosed that Magistrate Mitchell declined to issue the Warrant on December 17, 1979 because of insufficient probable cause, but did, in fact, issue the Warrant on December 18, 1979 on the strength of a revised Affidavit and Appendix A, which contained an analysis of seventy-

two (72) pages of the Foster records prepared by Geitgey (HT, 201, 229; Brief App, 48a).

The Warrant and eight (8) pages of the Appendix, but not the Affidavit were given to agents executing the Warrant.

The search resulted in the seizure of fifty-two (52) boxes or containers of S&T books, records and other documents dating from 1975 through the date of the search, i.e. December 19, 1979. Although the Affidavit to the Warrant alleges presumed violations of 18 U.S.C. Section 1962 at S&T during the years 1976 and 1977, the Foster records, however, related only to events with respect to the year 1977, when they were allegedly removed from the S&T business premises by Gaziano.

To date, no prosecution for any 18 U.S.C. violation has been undertaken. The records seized in this raid provided the basis for the development

of evidence leading to the instant Indictment for
tax evasion only.

**REASONS RELIED UPON FOR THE
ALLOWANCE OF THE WRIT**

- I. THE COURT ERRED IN FINDING THAT THE SEARCH WARRANT USED TO SEIZE PETITIONER'S FINANCIAL RECORDS WAS SUPPORTED BY SUFFICIENT PROBABLE CAUSE FOR ITS ISSUANCE.

The Federal Magistrate who eventually issued the warrant, rejected the first Affidavit of Probable Cause submitted by Special Agent Geitgey (HT, 229). The Magistrate's ruling that the Affidavit failed to demonstrate probable cause forced Geitgey to prepare Appendix A to that Affidavit. Appendix A is an analysis of the records provided to the FBI by Henrietta Foster, an employee of SERC. Based on a reading of Appendix A in conjunction with the Affidavit, and after a night's reflection, the Magistrate then issued the warrant in issue (HT, 230). Presumably, Appendix A provided some, if not all, of the elements which the Magistrate

initially lacked to support a finding of probable cause. Since no testimony was taken by the Magistrate, the Government is held to those allegations set forth in the Affidavit and Appendix A only.

Neither a reading of Appendix A, nor a combined reading of the Affidavit and Appendix A makes out any probable cause.

A.

The Activities And Statements Of SERC Employees, Henrietta Foster And Phillip Gaziano, Contained In The Warrant Are Not Sufficiently Related To Alleged Solomon And Teslovich, Inc. Criminal Activities To Support A Finding Of Probable Cause.

Numerous paragraphs in the Affidavit purportedly containing statements of alleged probable cause are in fact wholly irrelevant to the affairs of S&T and/or Petitioner.

Paragraphs 3 and 4 of the Affidavit continue for more than a page, describing in great detail Foster's conduct while a SERC employee and secretary to Gaziano in connection with an alleged fraudulent scheme concerning SERC's sale of coal to the Hatfield Power Station in Western Pennsylvania. Paragraph 5 of the Affidavit continues with the description of this alleged criminal conduct with respect to SERC business affairs only (Brief App, 43a).

Neither Foster's nor Gaziano's described conduct was in any way related to S&T's or Petitioner's business affairs by any reasonable construction of the Affidavit.

Nevertheless, both the District and Circuit Courts associate SERC activities with those of S&T and Solomon by drawing on language in Paragraphs 6 and 7 of the Affidavit describing Gaziano as a former accountant handling accounts payable and

receivable for S&T until October of 1977², followed by a reference to an article appearing in the Uniontown Morning Herald on October 1, 1978 in which Gaziano allegedly stated that,

"at S&T, under the direction of his father-in-law, George Teslovich, and particularly George Solomon, (the co-owners of S&T), he had learned every phase of the Company's operation". He stated that Solomon and Teslovich were "great teachers".

The District and Circuit Courts extrapolated these references into the equivalent of Gaziano's actual participation in alleged wrongdoing at S&T, justifying a search of its premises, even though Gaziano no longer worked there.

The District Court's denial of the Motion to Suppress and the Circuit Court's affirmance relied

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2. The Trial Court, in its Opinion, incorrectly indicates that Gaziano was an accountant for S&T until November, 1977. The Affidavit indicates only until October (Brief App, 13a et seq, 44a).

almost exclusively upon information supplied by Foster, as set out in the Affidavit.

But the Affidavit and Appendix demonstrate that: (1) Foster was not an S&T employee; (2) Foster participated in no alleged criminal conduct at S&T; (3) Foster had no firsthand knowledge about alleged criminal activity at S&T; (4) Gaziano made no admissions against his penal interests; (5) Gaziano indicated no personal criminal involvement in affairs at S&T; and (6) Foster made no statements against her own penal interests.³

In affirming, the Third Circuit has not followed its own teachings expressed in United

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3. The District Court indicated that since Foster had "received stolen property and knowingly concealed a possible federal Federal crime" (at SERC) that Foster's statements might be construed as against her penal interests. (Brief App, 16a, Finding 9; 44a, Paragraph 7). But even if so, we submit, the Affidavit is not rescued, since Foster speaks only to events at SERC, not S&T to which the Warrant relates.

States v. Bush, 647 F.2d 357 (3d Cir., 1981) where it said:

A legitimate basis of knowledge means in general that the informant either directly observed the critical facts or that he obtained those facts directly from one of the participants in the criminal enterprise who, by revealing those facts, made an admission against penal interest. See, United States v. Harris, 403 U.S. 573 (1971).

Id., F.N. 5 (emphasis supplied).

While this Court in Harris, supra, indicated that a basis of legitimate knowledge could be inferred when an informant obtains information from an actual participant in the criminal enterprise who himself makes an admission against penal interest, that is simply not the situation here. Plainly, Foster (the informant) did not "directly observe the critical facts" at S&T, nor did she obtain the information from "one of the participants" in the S&T matters.

Furthermore, nowhere in the records or otherwise as set out in the Affidavit is there any indication or acknowledgment of any wrong doing by Gaziano with regard to S&T's business transactions to which the records in the Warrant purportedly related. Gaziano's statement that the Foster records were "hot" is hardly the equivalent of indicating that he participated in some criminal action with respect to them (Brief App, 13a, Paragraph 7F). The Magistrate presumably reached the same conclusion in denying the first application for the Warrant.⁴

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4. In affirming, the Circuit Court relied on this Court's recent decision in Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317 (1983) to support a finding of probable cause for the instant Warrant (App., 3a). Petitioner contends that the Circuit misapplied the "totality of the circumstances" test adopted by this Court in Gates, since a fair review of these facts demonstrates no probable cause under the circumstances.

B.

The Alleged 1977 Work Papers Produced By Foster In July, 1979 Were Not Typical S&T Business Records And Can Not Support A Finding Of Probable Cause For the Issuance Of A Search Warrant.

Throughout the approximately seven pages comprising Appendix A, prepared by Agent Geitgey, numerous references are made to certain accounting work papers purportedly reflecting S&T business. The District and Circuit Courts apparently maintained that the various notations contained on these 1977 "work papers" provide probable cause to believe that evidence of 18 U.S.C. 1962(c) violations by Solomon would be found on the S&T premises

on December 19, 1979, over two years later.⁵

Appendix A to the Affidavit apparently persuaded the Magistrate to issue the Warrant on the second application.

Paragraph 10A of the Affidavit itself contains the following gratuitous conclusions by the affiant:

"Notations along the check stubs, as well as notations on separate ledger sheets indicated that although one payee was named on the check, disbursements in the amount of the check were not made to the payee, but rather were made to individuals identified by name or initials on the check stub or separate ledger sheet.

Paragraph 11 then summarizes various names or initials purportedly appearing on the ledger sheet and/or check stubs supplied by Foster. While

5. The issue of warrant staleness will be presented to the Court by the Certiorari Petition of George Teslovich Sr., Petitioner Solomon's co-defendant. The Solomon and Teslovich petitions will be moved for consolidated consideration of issues. (See Footnote 1, supra.)

Paragraphs 12 through 15 attempt to link the various names and/or initials described in Paragraph 11 with certain entities with whom S&T and Solomon do business, neither the Affidavit nor Appendix A recite a single instance in which the named payee did not, in fact, receive payment.⁶

Moreover, the Affidavit and Appendix A similarly fail to recite a single instance in which an individual whose name and/or purported initials appeared in notations on the ledger sheets or check stubs, or who did, in fact, receive payments corresponding to those notations. Nor do the affidavit and appendix indicate that any payments described on the ledger sheets or check stubs were funded by monies otherwise identified with an incorrectly named payee.

6. FBI Agent Geitgey testified that he did not check with third parties because of fear of compromising his investigation (HT 232).

Significantly, the "work papers" described in Appendix A are not identified, in fact, as business papers of the type maintained in the ordinary course of business of either S&T or Solomon. In fact, they are not typical of corporate type records such as invoices and ledgers. Moreover, the Affidavit fails to identify the source and/or author of these "work papers".

The failure of Appendix A to relate these 1977 documents to the daily business affairs of S&T and/or Solomon hardly suggests that such "work papers", or those of similar ilk, or indeed, any other type of corporate papers, would be at S&T offices on the day of the issuance of the warrant, i.e. December 18, 1979, over two (2) years later.⁷

7. Agent Geitgey analyzed documents relating to 1977 only, although the Warrant sought and the agents seized 1975, 1976 as well as records up to the date of seizure on December 18, 1979. (HT 275).

Neither the Affidavit nor Appendix A corroborate the representation that these work papers related to S&T business activities of an ongoing kind. Thus, inferences drawn from either the work papers or any other document received from Foster, rise only to the level of suspicion and cannot support a finding of probable cause for the issuance of a search warrant. See, Brineger v. United States, 338 U.S. 160, 175.

II. THE SEARCH WARRANT
WAS A PROHIBITED
GENERAL WARRANT.

The items sought pursuant to the Warrant
included:

Business records located at Solomon
& Teslovich, Inc. and which pertain to
the business activities from January
1, 1975 to present of Solomon &
Teslovich, Inc. but limited to all cash
receipt and disbursement journals and
ledgers, checks, wire transfers, books
of account; in addition thereto any
other writing pertaining to Solomon &
Teslovich, Inc. which reflect payments
to employees or agents of unions,
United States Steel, PennDot or other
business or governmental entities.

The language in this Warrant is overbroad,
and is therefore a General Warrant, in violation of
the Fourth Amendment. This Court has said that
the standard for judging the probable cause
allegations of a warrant is "whether the description
. . . is sufficient to enable the officer armed with
it to ascertain and identify with reasonable effort
the place to be searched and the things to be

seized." Sanford v. Texas, 379 U.S. 476 (1968)
(emphasis supplied).

We note first the the warrant seeks records beyond any periods of time expressed or implied in the Probable Cause Affidavit and Appendix.⁸

Second, the Search Warrant lacks the requisite particularity which this Court requires. See Sanford, id.

Endeavoring to uphold the Sanford standard, the Ninth Circuit has ruled that only items which a warrant specifically enumerates may be seized. United States v. Tamura, 649 F.2d 591 (9th Cir., 1982). In so holding, the Tamura court recognized that seizure of large quantities of records, as here,

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8. The Warrant approves seizure of items from January 1, 1975 to December 18, 1979. Probable cause allegations relate to much more narrow time frames, including May 25, 1977 to October 28, 1977 and July-December, 1979 only. Petitioner Teslovich will address the issue of staleness presented by this chronology.

created a danger of overstepping the warrant's authority. Id., at 595, citing United States v. Abrams, 615 F.2d 541, 543 (1st Cir., 1980). See also, United States v. Rettig, 589 F.2d 418 (9th Cir., 1978).

The First Circuit has also proscribed the use of warrants which, by their language, tend to give police officers unfettered discretion as to which items they will seize. In condemning the use of a warrant which authorized a general seizure of a doctor's Medicare records, that Circuit said:

The warrant at issue fails to meet the requirement of particularity. The officers' discretion was unfettered, there is no limitation as to time, and there is no description as to what specific records are to be seized. . . . It seems clear that the executing officers could not or made no attempt to distinguish bona fide records from fraudulent ones so they seized all of them in order that a detailed examination could be made later. That is exactly the kind of investigatory dragnet that the fourth amendment was designed to prevent.

Abrams, supra at 615 F.2d 541 (1st Cir., 1980).

At the same time, Abrams rejected any relaxation of these requirements because of exigent circumstances where,

There was a four year investigation here. The warrant was not drafted under conditions of exigency. There was no reason for the magistrate to act in haste. The government should have known exactly what records it wanted and there was ample time to draft a warrant that would meet the requirements of the fourth amendment and avoid the proscription against generality.

Id., at 667, n. 5. See also, Application of Lafayette Academy, Inc., 610 F.2d 1 (1st Cir., 1979) (items to be seized must be specifically described for the benefit of those subject to search). Ample time also existed in the matter sub judice to craft a more precise warrant.

Nevertheless, in affirming, the Third Circuit misapplied these principles, all derived from this

Court's teachings in a long line of decisions, including Sanford, supra.

First, as the supervising case agent on the raid testified, none of the agents who executed the Warrant was given the Affidavit, nor more than eight (8) pages of the seventy-two (72) page Attachment A. Thus, none had full guidance in limiting his search (HT, 324). Indeed, the breadth of the Warrant and its inclusiveness from 1975 through 1979, as well as its demand for all S&T records dealing with various entities, prompted the agents to take over fifty-two (52) boxes and containers of records.

As the Motion to Suppress testimony shows, practically no independent judgment was made by the Agents with respect to what to take. As a consequence, wholesale seizure of unrelated items occurred, including seizure of Solomon's personal tax returns, his wife's rental property books, and

numerous other documents having no connection with S&T and 18 U.S.C. Section 1962 violations. (See Inventory to Search Warrant).

The Third Circuit itself recently spoke to this question of general warrants in United States v. Johnson, 690 F.2d 60 (3rd Cir., 1982) cert denied, 103 S.Ct. 1212 (1983), in a split decision, with two concurring and one dissenting opinion. Quoting time honored principles expressed by this Court in Coolidge v. New Hampshire, 403 U.S. 433, 467 (1971) the Circuit said:

Although the general rule is that a particularized affidavit cannot be used to cure a general warrant, there is a recognized exception which applies in this case. When a warrant is accompanied by an affidavit that is incorporated by reference, the affidavit may be used in construing the scope of the warrant. Application of Lafayette Academy, Inc., 610 F.2d 1, 4 (1st Cir. 1979).

Johnson, supra at 64.

But, the First Circuit, construing Lafayette, supra in United States v. Roche, 614 F.2d 6 (1st Cir. 1980), held that an affidavit may be used to construe the scope of a warrant only when the affidavit accompanies the warrant, and where the warrant uses appropriate words of reference to incorporate the affidavit. Id. at 8.

The Roche court explained that requiring that the affidavit accompany the warrant circumscribes the discretion of the executing officer and informs the person subject to the search of the permissible scope of the warrant. Id.

For this very reason the search warrant at issue here cannot be saved by representations contained in the Affidavit and/or Attachment A, since neither was part of the actual warrant as used by the agents executing it, nor were they made available to the person (Solomon and S&T) made subject to the search.

Petitioner is aware that where, as here, an overbroad general warrant is employed, redaction of the improper phrases and clauses may be appropriate. United States v. Christine, 687 F.2d 749 (3rd Cir. 1982).

Nevertheless, applying the Christine rationale, if the description "from January 1, 1975 to present" is redacted from the instant warrant because the statements of alleged probable cause relate only to the period of time between May 15, 1977 and October 28, 1977, the remaining description of items to be seized in the warrant lacks the requisite particularity demanded by the Fourth Amendment, since a thus purged warrant attempts to reach all of S&T's records of income and expense for an otherwise unspecified period.

We dare say, it is doubtful that this would leave any records unseized and in actual implementation that is precisely what occurred.

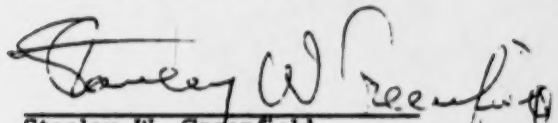
Since no meaningful portion of the warrant would remain after Christine redaction, the appropriate sanction is suppression of all evidence seized pursuant to the generalized warrant. See also United States v. Tamura, 694 F.2d 591 (9th Cir. 1982).

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

GREENFIELD & MURTAGH


Stanley W. Greenfield,
Attorney for Petitioner,
George A. Solomon

CERTIFICATE OF SERVICE

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

I hereby certify that on the 23rd day of January, 1984, three (3) true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, were served on each of the individuals and in the manner indicated below, which service satisfies the requirements of Rule 28 of the United States Supreme Court Rules.

SERVICE BY FIRST CLASS, UNITED STATES MAIL, POSTAGE PREPAID:

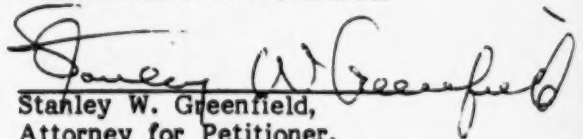
1. Rex E. Lee
SOLICITOR GENERAL
United States Department of Justice
Room 5143
Main Justice Building
Washington, D.C. 20530

2. Paul J. Brysh, Esquire
Assistant United States Attorney
Western District of Pennsylvania
633 U. S. Post Office and Courthouse
Seventh Avenue and Grant Street
Pittsburgh, Pennsylvania 15219

3. Counsel for George R. Teslovich:

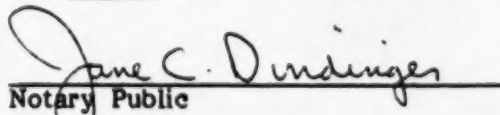
Frederick D. Fahrenz, Esquire
Preiser & Wilson, Legal Corporation
Post Office Box 2506
1012 Kanawha Boulevard East
Charleston, West Virginia 25329

GREENFIELD & MURTAGH


Stanley W. Greenfield,
Attorney for Petitioner,
Geroge A. Solomon

SWORN to and subscribed before me

this 23rd day of January, 1984.


Notary Public

My Commission Expires:

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5312/13 and 83-5339

UNITED STATES OF AMERICA

v.

GEORGE A. SOLOMON,
Appellant in No. 83-5312

GEORGE M. TESLOVICH, JR.,
Appellant in No. 83-5313

GEORGE R. TESLOVICH,
Appellant in No. 83-5339

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Criminal Nos. 82-00171-01/03/02)
District Judge: Hon. Donald E. Ziegler

Submitted Under Third Circuit Rule 12(6)
December 2, 1983

Before: GIBBONS and SLOVITER,
Circuit Judges
and GREEN, District Judge*
(Filed: Dec 5 1983)

*Hon. Clifford Scott Green, United States District
Judge for the Eastern District of Pennsylvania,
sitting by designation.

MEMORANDUM OPINION OF THE COURT

GIBBONS, Circuit Judge

George A. Solomon, George R. Teslovich and George M. Teslovich, Jr. pled guilty to charges of income tax evasion, reserving the right to appeal from the denial of their motion to suppress evidence. See United States v. Moskow, 588 F.2d 882, 885-90 (3d Cir. 1978). They contend that the books and records seized from the office of Solomon & Teslovich, Inc. on December 19, 1979 should have been suppressed.

The affidavit used in applying for the search warrant relied on information contained in a package of records in the possession of Henrietta Foster, which she was holding for Philip Gaziano. The appellants contend that opening the package and the records was a warrantless search in violation of the fourth amendment. Only Gaziano

had any expectation of privacy in the package. See Rakas v. Illinois, 439 U.S. 128, 132-49 (1978).

Appellants contend that the affidavit was legally insufficient in establishing probable cause for the issuance of a warrant. We have examined it in light of the governing standards announced in Illinois v. Gates, U.S. , 103 S. Ct. 2317, 2332 (1983), and find it to be adequate.

Appellants contend that the warrant was insufficiently specific to limit the books and records subject to seizure. See United States v. Johnson, 690 F.2d 60, 63-66 (3d Cir. 1982), cert. denied, 103 S. Ct. 1212 (1983); see United States v. Christine, 687 F.2d 749, 752-53 (3d Cir. 1982). Adequacy of the description depends on the nature of the suspected criminal activity, the nature of the items to be seized, and the difficulty of specifying volumes of records covering an extended period. In this case the warrant authorized the seizure of

business records located at Solomon & Teslovich Inc. and which pertain to the business activities from Jan. 1, 1975 to present of Solomon & Teslovich, Inc. but limited to all cash receipt and disbursement journals and ledgers, checks, wire transfers, books of account; in addition thereto any other writings pertaining to Solomon and Teslovich, Inc. which reflect payments to employees or agents of unions, United States Steel, PennDot or other business or governmental entities.

The warrant identified certain documents — journals, ledgers, checks, wire transfers, and books of account — by type, and qualified "any other writings" as pertaining to payments to persons or entities with whom Solomon and Teslovich dealt. Under these circumstances, we conclude that the warrant was sufficiently specific.

Appellants contend that the seizure of work papers prepared by an independent accountant, Frank Lucas, from a separate office, for which Lucas had a key, and in which he kept work papers about other clients, was beyond the scope of the

warrant, and violated the fourth amendment. Appellants had no property interest in the work papers and no expectation of privacy with respect to them. See Rakas v. Illinois, 439 U.S. 128, 132-49 (1978).

Finally, appellants contend that the agents who made the seizure failed to file an inventory satisfying Fed. R. Crim. P. 41. We find no prejudice flowing from any such failure, and therefore no ground for suppressing evidence. See United States v. Hall, 505 F.2d 961, 964 (3d Cir. 1974).

The judgment of sentence will, therefore, be affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/ John J. Gibbons
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5312/13 and 83-5339

UNITED STATES OF AMERICA

v.

GEORGE A. SOLOMON,
Appellant in No. 83-5312

GEORGE M. TESLOVICH, JR.,
Appellant in No. 83-5313

GEORGE R. TESLOVICH,
Appellant in No. 83-5339

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Criminal Nos. 82-00171-01/03/02
District Judge: Hon. Donald E. Ziegler

Before: GIBBONS and SLOVITER,
Circuit Judges
and GREEN, District Judge

(Filed: Dec 5 1983)

JUDGMENT

These causes came on to be heard on the
record from the United States District Court for the

Western District of Pennsylvania and were submitted under Third Circuit Rule 12(6) on December 2, 1983.

On consideration hereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered April 20, 1983 in Criminal No. 82-171-03, entered on April 22, 1983 in Criminal No. 82-171-01, and entered on April 28, 1983 in Criminal No. 82-171-02, appealed here respectively, be and the same are, hereby affirmed.

/s/N. Elizabeth Ferguson
N. Elizabeth Ferguson,
Deputy Clerk

Dated: December 5, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5312

UNITED STATES OF AMERICA
vs.
GEORGE A. SOLOMON, Appellant

Pursuant to Rule 41(b) of the Federal Rules
of Appellate Procedure, it is O R D E R E D
that issuance of the certified judgment in lieu of
formal mandate in the above cause be, and it is
hereby stayed until January 24, 1984.

/s/ Aldisert
Circuit Judge

Dated: Jan. 3 1984

Nos. ~~83-1234~~ and 83-1291

Office - Supreme Court, U.S.

FILED

APR 20 1984

In the Supreme Court of the United States

ALEXANDER L. STEVENS
CLERK

OCTOBER TERM, 1983

GEORGE R. TESLOVICH, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE A. SOLOMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE

Solicitor General

GLENN L. ARCHER, JR.

Assistant Attorney General

ROBERT E. LINDSAY

MICHAEL J. ROACH

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

QUESTIONS PRESENTED

1. Whether the search warrant in this case was supported by probable cause.
2. Whether the search warrant's description of the things to be seized satisfied the particularity requirement of the Fourth Amendment.
3. Whether the seizure of certain records belonging to petitioners' accountant violated any of petitioners' rights under the Fourth Amendment.
4. Whether the alleged failure of the agents executing the warrant to prepare an adequate inventory of the items seized required suppression of the evidence.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1231

GEORGE R. TESLOVICH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-1291

GEORGE A. SOLOMON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 3a-6a)¹ is reported at 725 F.2d 671. The oral findings of fact and conclusions of law of the district court denying petitioners' motion to suppress evidence (Pet. App. 25a-46a) are unreported.

¹"Pet. App." refers to the Appendix to the Petition in No. 83-1231.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1983 (Pet. App. 1a-2a). The petition for a writ of certiorari in No. 83-1231 was filed on January 25, 1984, and the petition for a writ of certiorari in No. 83-1291 was filed on January 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petitioners, George A. Solomon and George R. Teslovich, entered conditional guilty pleas to charges of income tax evasion, in violation of 26 U.S.C. 7201. Solomon was sentenced to seven years' imprisonment and a \$30,000 fine. Teslovich was sentenced to five years' imprisonment and a \$30,000 fine. The court of appeals affirmed petitioners' convictions after rejecting their challenge to the district court's denial of their motion to suppress evidence seized from the offices of Solomon & Teslovich, Inc. (Pet. App. 4a-6a).²

1. The government's application for the search warrant at issue in this case was supported by an affidavit dated December 18, 1979, from Richard R. Geitgey, a Special Agent of the Federal Bureau of Investigation (Pet. App. 11a-17a). Geitgey represented that information regarding Solomon & Teslovich, Inc. had come to his attention while he was investigating a scheme involving commercial bribery and fraud on the part of Suncrest Environmental Resources, Inc. (SERC) and its owner, Phillip Gaziano. Henrietta Foster, an employee of SERC and secretary to Gaziano, admitted to Geitgey that she had taken part in the scheme.

²The court of appeals also affirmed the conviction of petitioners' co-defendant, George R. Teslovich, Jr. The younger Teslovich, who received a sentence of three years' imprisonment with all but 179 days suspended, a \$10,000 fine, and three years' probation with a requirement of community service, has not sought review in this Court.

She said that Gaziano had instructed her to prepare and cash forged checks. Gaziano then used the money to pay off one Alfred Royster, Jr., an employee at a power plant that purchased coal from SERC. In return, Royster would manipulate coal samples so that SERC would be paid more than its coal was actually worth. *Id.* at 11a-12a.

Geitgey personally interviewed Gaziano, who said he barely knew Royster. It was established through a travel agency, however, that Gaziano sent Royster on a trip abroad paid for with SERC funds. An official at the Hatfield Power Station confirmed that Royster was in a position to manipulate coal samples and had been under suspicion for that type of activity. In monitored conversations, Gaziano attempted to persuade Foster to refrain from mentioning Royster when she appeared before a grand jury. *Pet. App.* 12a-13a.

Gaziano told Geitgey that, prior to October 1977, he had worked as an accountant for Solomon & Teslovich (*Pet. App.* 13a). As Geitgey further related in the affidavit (*id.* at 13a-14a):

7. Henrietta Foster also stated that in November of 1977, when she first became employed for Gaziano as a secretary-bookkeeper, Gaziano gave to her two manila packages, which Gaziano told Foster contained records of Solomon and Teslovich, Inc., business transactions, which occurred while Gaziano was employed at S and T. Gaziano explained to Foster that the records were "hot" and were very incriminating to S and T. Gaziano went on to explain that if the records got into the "wrong hands", the records could cause a "fire".

8. Henrietta Foster further stated that Gaziano was very concerned about the FBI's inquiries pertaining to the operations of SERC and on July 17, 1979, asked Foster to retrieve the records, which she had been

keeping for Gaziano, pertaining to S and T. Foster explained to Gaziano that the records were at the home of her son in Oil City, Pa. and that it would take at least one day to retrieve the records. Gaziano instructed her to retrieve the records and return them to him for destruction.

9. I was able to verify the existence of Gaziano's "hot" records of S and T when Henrietta Foster voluntarily produced the records for the undersigned. In my presence, the two packages were opened, and documents pertaining to S and T and Redstone Hauling Co. were reflected throughout the two packages. Those records pertaining to 1976 and 1977 were copied in my presence and then returned to Ms. Foster who stated she returned them to Gaziano.

The affidavit went on to explain that Geitgey and Special Agent Thomas Powers, an accountant, had examined the records produced by Henrietta Foster. They found notations on ledger sheets and check stubs indicating that money was distributed to persons other than the named payees. Some of the names or initials noted corresponded to the names or initials of individuals holding responsible positions in entities with which Solomon & Teslovich did business, such as United States Steel Corp., the Pennsylvania Department of Transportation, and Laborer's Union Local 1308. Pet. App. 14a-16a.

The affidavit further stated (Pet. App. 16a) that:

16. I interviewed Brenda Royster of the Second National bank of Masontown who is a teller at said bank and who stated to me that an individual by the name of Pat Burns who is known to her as an employee of S and T appears at her teller window and cashes S and T checks payable to other companies — with scribbled endorsements — in amounts so large that the teller often has to get additional cash from the vault.

Special Agent Geitgey concluded his affidavit by expressing the belief that Solomon & Teslovich, Inc. was engaged in conduct in violation of 18 U.S.C. 1962(c) (Pet. App. 17a). Attached to Geitgey's affidavit was Special Agent Powers' detailed description of the records produced by Henrietta Foster (*id.* at 18a-24a). Also attached were copies of the records that had been examined (Solomon App. 55a-126a).³

Initially, the affidavit of Special Agent Geitgey was submitted to a magistrate without the statement of Special Agent Powers or copies of the Foster documents. The magistrate declined to issue a warrant solely on the basis of the affidavit. He requested Agent Powers' summary of the records and the documents themselves, examined them overnight, and then issued the warrant (Teslovich App. 251-252).

2. Petitioners moved to suppress the evidence seized pursuant to the search warrant and to dismiss the indictment against them (Pet. App. 26a). After a hearing on the motion to suppress, the district court concluded that Foster's statements to the investigating agents, together with the copies of apparently incriminating records that she provided to them and the information Special Agent Geitgey obtained from other sources corroborating numerous details shown by the Foster records, established probable cause to believe that a pattern of commercial bribery existed at Solomon & Teslovich (*id.* at 32a-33a). The court further found that the warrant sufficiently described the documents to be seized in light of the fact that the affidavit and its supporting documentation showed the existence of an extensive scheme to generate cash by fabricating records maintained in the ordinary course of business, recording the

³"Solomon App." and "Teslovich App." refer to the Record Appendices filed by petitioner Solomon and co-defendant George M. Teslovich, Jr., respectively, in the court below.

payment of numerous bribes with cryptic notations on a wide variety of documents, and concealing the improper payments by scattering fictitious payments to suppliers through the accounting records of the business (*id.* at 36a-37a). Accordingly, the district court concluded that the search of the offices of Solomon & Teslovich on December 19, 1979, was lawful, and it denied petitioners' motion to suppress the evidence seized in that search (*id.* at 38a). The court of appeals affirmed in an unpublished opinion (*id.* at 4a-6a).

ARGUMENT

The court of appeals correctly decided the issues presented. Its unpublished decision does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. Both petitioners contend (83-1231 Pet. 5-11; 83-1291 Pet. 16-27) that the warrant to search the offices of Solomon & Teslovich was not supported by probable cause. Both petitioners assert that, since Foster was not an employee of Solomon & Teslovich, but rather claimed to have learned about its affairs, including the alleged bribery scheme, while she was an employee of SERC, an independent company, the affidavit failed to demonstrate that she had an adequate basis of knowledge for her statements that the sealed records that had been given to her by her supervisor, Phillip Gaziano, were "very incriminating" to Solomon & Teslovich (83-1231 Pet. 7-9; 83-1291 Pet. 20-22).

In *Illinois v. Gates*, No. 81-430 (June 8, 1983), slip op. 15-24, this Court rejected the so-called "two-pronged test," derived from its prior decisions in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), for determining whether an informant's report,

together with any corroboration derived from the government's independent investigative efforts, is sufficient to establish probable cause for the issuance of a search warrant. Instead, the Court held that the existence of probable cause must be judged by the "totality of the circumstances" surrounding the informant's report and the investigation made by the government agents. *Gates*, slip op. 23.

Applying the "totality of the circumstances" test established in *Gates*, the court of appeals correctly concluded that there was probable cause to believe that the records of Solomon & Teslovich contained evidence of crimes, including commercial bribery and racketeering violative of 18 U.S.C. 1962(c). Henrietta Foster was employed by Phillip Gaziano, who, in turn, had been an accountant at Solomon & Teslovich and had married the daughter of one of its principal owners (Pet. App. 13a). While employed by Gaziano, Foster was given two envelopes allegedly containing very incriminating information concerning Solomon & Teslovich and asked to conceal the envelopes by removing them from the premises of her employer (Teslovich App. 35-39). When Gaziano gave Foster the envelopes, he told her that "they were hot, and that if they fell into the wrong hands, they could cause a fire" (*id.* at 37). Foster turned over copies of the records in the envelopes to the government (*id.* at 40, 52-55).

The FBI's analysis of the Foster records, including accountant's workpapers, showed that the proceeds of numerous checks drawn on the corporate checking account of Solomon & Teslovich were being distributed to persons other than the payees (Pet. App. 14a-16a, 18a-24a). Agent Geitgey stated in his affidavit that he was able to establish that the names associated with these payments were not the names of employees who worked at the firms to which the checks were made payable (*id.* at 16a). In addition to petitioners Solomon and Teslovich, the payees shown in the

Foster records included supervisory employees of unions, businesses, and government agencies with which Solomon & Teslovich, Inc. dealt in the course of its business (*id.* at 15a-16a). Geitgey further established that a person identified as an employee of Solomon & Teslovich frequently cashed checks payable to other companies — with scribbled endorsements — in amounts so large that the teller had to get additional cash from the vault (*id.* at 16a).

The magistrate thus was presented with a pattern of unusual transactions apparently designed to generate large amounts of cash and to make numerous cash disbursements to persons who were responsible for monitoring the performance of various types of contractual obligations by Solomon & Teslovich. It is difficult to imagine any reason why an honest businessman would conduct his business in this way, but such practices easily could be used to induce the employees of customers, labor unions, and government agencies to approve substandard work, inferior products, or noncompliance with the terms of labor contracts. In addition, the use of fictitious checks to suppliers and forged endorsements suggests that petitioners, as the principal officers and owners of Solomon & Teslovich, were trying to disguise the payments as legitimate tax deductible business expenses and to conceal the payments. These substantial indications of wrongdoing more than satisfy this Court's practical, common sense criteria for establishing probable cause under a "totality of the circumstances" analysis. See *Gates*, slip op. 15-17, 28-30.

2. Petitioner Solomon argues (83-1291 Pet. 28-36) that the search warrant in this case was overbroad and constituted a general warrant in violation of the Fourth Amendment. As the court of appeals pointed out, however, the degree of particularity required in a warrant "depends on the nature of the suspected criminal activity, the nature of the items to be seized, and the difficulty of specifying

volumes of records covering an extended period" (Pet. App. 4a-5a). See *Andresen v. Maryland*, 427 U.S. 463, 481 n.10 (1976); *United States v. Christine*, 687 F.2d 749, 760 (3d Cir. 1982). As this Court stated in *Andresen*, 427 U.S. at 481 n.10, the "complexity of an illegal scheme may not be used as a shield to avoid detection" by making it practically impossible to satisfy the Fourth Amendment requirement of particularity in the description of the records to be seized.

The search warrant in this case adequately described the things to be seized. In addition to the limitations in the warrant itself with respect to the dates covered and the types of documents sought (see Pet. App. 7a-8a), the warrant referred to the supporting affidavit, which in turn contained a detailed description of the method by which petitioners were carrying out their alleged commercial bribery scheme, together with examples of the types of notations on the books and records of Solomon & Teslovich that were used to conceal the nature of the payments being made and to disguise them as legitimate business expenses (Pet. App. 7a-17a).⁴ A warrant may contain a clause authorizing the seizure of things other than those expressly described, provided that it is clear from the context that the additional authority relates to evidence of the crime for which the issuing magistrate found probable cause to authorize a search. *Andresen v. Maryland*, 427 U.S. at 480-482; *United States v. Johnson*, 690 F.2d 60, 64 (3d Cir. 1982), cert. denied, No. 82-5869 (Feb. 22, 1983). The court of appeals

⁴Petitioner Solomon contends that none of the agents participating in the search received a copy of the affidavit (82-1291 Pet. 32). This is simply wrong. Agent Geitgey testified that, on the day before the search, he briefed the agents who were to participate in it, and that at that briefing he distributed copies of the warrant, the affidavit, and eight specimen pages from the Foster records (Teslovich App. 311-312). In addition, three or four complete copies of the Foster records were available for the agents to examine at the briefing (*ibid.*).

correctly concluded that, in light of the detailed statements in the affidavit, the description in the warrant of the things to be seized was sufficiently specific (Pet. App. 4a-5a). Further review of this essentially fact-bound issue is not warranted.

3. Petitioner Teslovich argues (83-1231 Pet. 11-16) that the seizure of the workpapers of Frank Lucas, the accountant who prepared the federal tax returns of Solomon & Teslovich, exceeded the scope of the warrant. But petitioner Teslovich concedes (83-1231 Pet. 11-12) that the workpapers seized from the office maintained by Lucas on the premises of Solomon & Teslovich were not the property of petitioners and that only Lucas had access to them. Since petitioner Teslovich does not, and could not, assert any legitimate expectation of privacy with respect to Lucas' papers, the court of appeals correctly held (Pet. App. 5a) that his Fourth Amendment rights were not violated by the seizure of these records. See *Rakas v. Illinois*, 439 U.S. 128, 132-149 (1978).⁵

4. Finally, petitioner Teslovich contends (83-1231 Pet. 16-18) that the agents failed to prepare an adequate inventory of the items taken in the search. Even if true,⁶ petitioner

⁵*Mancusi v. DeForte*, 392 U.S. 364, 368-369 (1968), cited by petitioner Teslovich (83-1231 Pet. 16), is not to the contrary, since in that case it was stipulated that DeForte, the defendant who sought to suppress the evidence seized in a warrantless search of his office, was the custodian of the records seized in the search, even though the office belonged to his employer and the records were official, not personal records. Whatever aid *Mancusi* might give Lucas if he were moving for suppression, it gives none to petitioner Teslovich.

⁶The only defect shown in the record is that the inventory was prepared by an agent other than the applicant for the warrant (see 83-1231 Pet. 16). But the agent who prepared the inventory was one of the two agents who had supervisory responsibility for the search. Thus, it is difficult to see how anyone was prejudiced. As for the specificity of the inventory, the volume of documents seized clearly made it impossible to list each and every one separately.

cites no authority, and we know of none, for the proposition that a violation of the inventory requirement of Fed. R. Crim. P. 41(d) is grounds for the suppression of evidence. The seizure of evidence pursuant to a valid warrant is not converted into a violation of the Fourth Amendment by the failure of the officers responsible for the seizure to comply with the "essentially ministerial" requirements of Fed. R. Crim. P. 41(d). *United States v. Hall*, 505 F.2d 961, 963 (3d Cir. 1974). See also *Cady v. Dombrowski*, 413 U.S. 433, 449 (1973). And even if the Fourth Amendment were violated by the failure to prepare the inventory properly, we fail to see how any evidence introduced at trial could be said to be a fruit of such an infraction.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE

Solicitor General

GLENN L. ARCHER, JR.

Assistant Attorney General

ROBERT E. LINDSAY

MICHAEL J. ROACH

Attorneys

APRIL 1984